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No. 82-1198

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

W. H. PLANT, JR. and DORIS D. PLANT,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners in this case are seeking certiorari on the principal ground that a two-to-one decision of the Eleventh Circuit conflicts with decisions of this Court holding that payments received in advance of production do not prevent the retention of an "economic interest" for income tax purposes. This case was docketed on January 12, 1983; and two days earlier, on January 10, this Court granted certiorari in Docket No. 82-599, *Engle v. Commissioner,* 677 F.2d 594 (7th Cir. 1982), and Docket No. 82-774, *Farmar v. United States,* 689 F.2d 1020 (U.S. Cl. Ct. 1982). Those cases are bringing the very same issue before this Court and

involve the same decisions of this Court relied upon by the petitioners in this case. Therefore, in order for there to be consistent interpretation of these principles of federal income tax law, the Court should grant certiorari in this case also.

As stated in the petition for certiorari, the test for determining whether a taxpayer is entitled to percentage depletion on advance payments under an oil and gas lease is the same as the test for determining whether a taxpayer is entitled to capital gain treatment on advance payments under a timber cutting contract. In each instance, the test is whether or not the taxpayer has disposed of minerals or timber under a contract or lease in which he has retained an economic interest.

In *Engle* and *Farmar*, the question presented is whether the recipient of royalties or bonuses under an oil and gas lease is entitled to a deduction for percentage depletion with respect to advance royalties or bonuses paid when there is no production in that year.[1] In both cases, the courts below acknowledged that long-standing decisions of this Court allow depletion on payments made in advance of production, citing *Douglas v. Commissioner*, 322 U.S. 285 (1944); *Herring v. Commissioner*, 293 U.S. 322 (1934), and *Burnet v. Harmel*, 287 U.S. 103 (1932). The decision of the Eleventh Circuit in this case is in conflict with both *Engle* and *Farmar* as well as the decisions of this Court.

The history of income taxation of timber cutting contracts clearly shows that the economic interest test established by this Court is applicable to timber cutting contracts.

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[1]The Government is contending in *Engle* and *Farmar* that Congress changed the law with respect to advance payments in oil and gas leases when it enacted 26 U.S.C. § 613A in 1975.

The Treasury Department, relying on the decisions of this Court in the mineral cases, contended prior to 1943 that payments made under a timber cutting contract were the same as royalty payments under an oil and gas lease resulting in ordinary income subject to depletion rather than capital gain from the sale of timber. Bureau of Internal Revenue, Field Procedure Memo No. 249, Feb. 17, 1943. In reaching this conclusion the Treasury Department relied upon *G.C.M. 22730,* 1941-1 Cum. Bull. 214, which contains an analysis of the Supreme Court decisions in the oil, gas and mineral cases. These decisions hold that an economic interest is retained in minerals paid for in advance whether or not there is a guarantee of production in a later year.

As a result, Congress in 1943 enacted legislation providing for capital gain treatment on the disposition of timber pursuant to a cutting contract.[2] In so doing, it expressly adopted the concept of economic interest established by this Court in the oil, gas and mineral cases. Thus, the Senate Finance Committee stated that . . . "this . . . provision will afford relief to those who have leased their property under a contract whereby they retain an economic interest in the timber and are not entitled under present law to capital gains treatment because of that fact."[3]

It is absolutely clear that the test for capital gain treatment on the disposition of timber pursuant to a cutting contract is the same as the test for depletion under an oil and gas lease. This Court has held repeatedly for more than fifty years that an economic interest is retained even though payments are received in advance of production and without any guarantee of production. *Douglas v. Commis-*

[2] § 117 (k) (2) of the 1939 Internal Revenue Code, added by Sec. 127 (a) of the Revenue Act of 1943. However, no depletion is allowed, 26 C.F.R. § 1.611-1 (b) (2).

[3] Sen. Rep. 627, 78th Cong., 1st Sess., p. 25-26, 1944 Cum. Bull. 973, 993.

sioner, supra, Herring v. Commissioner, supra, and *Burnet v. Harmel, supra.* Therefore, since the test for capital gain treatment on timber and percentage depletion on minerals is identically the same, *i.e.*, whether the taxpayer has retained an economic interest, these decisions of the Supreme Court are determinative of the issue in this case.

CONCLUSION

The granting of certiorari in *Engle* and *Farmar* will bring before this Court the principles established by this Court in *Douglas v. Commissioner, supra, Herring v. Commissioner, supra,* and *Burnet v. Harmel, supra.* The two-to-one panel decision of the Eleventh Circuit in this case directly conflicts with those Supreme Court decisions. It also conflicts with the decisions in *Engle* and *Farmar* in which certiorari was recently granted. For this reason, a writ of certiorari should issue to review the judgment and opinions of the Eleventh Circuit.

Respectfully submitted,

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